2009

Robert Longevuan v. Souper Salad Inc., Terramerica Inc., Legacy Management Co. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ROBERT LONGEVUAN,

Plaintiffs/Appellants,

v.

SOUPER SALAD, INC., a Texas Corporation, Appellee, TERRAMERICA INC., a Utah Corporation, and LEGACY MANAGEMENT CO., a Utah LLC,

Defendants.

SOUPER SALAD, INC., Appellee.

Appellate Case No. 20091010

BRIEF OF APPELLANTS

Appeal from a Judgment of Third Judicial District Court
of Salt Lake County, State of Utah
Honorable Mark Kouris

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JURISDICTION

This court has jurisdiction to decide this appeal, pursuant to U.C.A. § 78A-4-103(j)(2009), as an appeal from a grant of Summary Judgment by the Third Judicial District Court of Salt Lake County, State of Utah, entered on November 12, 2009. This appeal was "poured-over" to the Utah Court of Appeals pursuant to U.C.A. §78A-3-102(4)(2009).

ISSUES ON APPEAL

The following issue is presented on appeal: Whether the District Court erred in dismissing this action as to Souper Salad, because of the automatic stay and/or discharge injunction issued by the bankruptcy court in Souper Salad's Chapter 11 proceeding. Souper Salad's motion was made pursuant to Utah R. Civ. P. 12(b)(6), but it referenced matters outside the pleadings, specifically, the bankruptcy filing and discharge, so it is treated as a motion for summary judgment.See *DOIT, Inc. v. Touche, Ross & Co.*, 926 P.2d 835, 838 n.3 (Utah 1996). The effect of a bankruptcy stay on state civil litigation is a question of law, for which no deference is given to the trial court's conclusions. See *Citicorp Mortgage, Inc., v. Hardy*, 834 P.2d 554 (Utah 1992)(determining effect of bankruptcy stay on state statute of limitations); accord, *Arreygue v. Lutz*, 116 Wn. App. 938, 69 P.3d 881(2003)(appeals court reviews *de novo* trial court's dismissal of personal injury claim pursuant to bankruptcy stay). The issue was raised by motion at R. 123, and opposed by Longevuan at R. 132.

No addendum is necessary as the determinative statutes are reproduced in full hereafter.

DETERMINATIVE AUTHORITIES

The determinative statutes in this case are:

A discharge in a case under this title--
(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor . . .

11 U.S.C. §524(a)(1988).

The stay does not extend to other parties:
Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

11 U.S.C. §524(e)(1988).

Required provisions of liability insurance policies.

Every liability insurance policy shall provide that the bankruptcy or insolvency of the insured may not diminish any liability of the insurer to third parties, and that if execution against the insured is returned unsatisfied, an action may be maintained against the insurer to the extent that the liability is covered by the policy.

U.C.A. §31A-22-201 (1985).

STATEMENT OF THE CASE

1. Nature of the Case

This case is a suit for damages for personal injuries, arising out of a slip and fall at a Souper Salad restaurant in Holladay, Utah, on February 3, 2004.

2. Course of Proceedings and Disposition in the Court Below

Longevuan was a patron of the Souper Salad restaurant in Holladay, Utah, and slipped on ice outside the front doorway, falling and causing serious injuries to himself, ultimately resulting in amputation of one leg, and medical bills exceeding $200,000. He filed this action against the landlord, property management company, and the restaurant operator, Souper Salad. Souper Salad

interposed, by Utah R. Civ. P. 12(b)(6) motion, a discharge in bankruptcy dated November 11, 2005. Based upon that discharge, the trial court dismissed the action as to Souper Salad, on March 27, 2009. This order was certified as final, pursuant to Utah R. Civ. P. 54(b), on November 12, 2009. Longevuan filed his appeal on November 23, 2009. The appeal was "poured-over" to this Court by the Utah Supreme Court.

3. **Statement of Relevant Facts on Appeal**

On February 3, 2004, Longevuan slipped and fell on the outdoor handicap ramp of the "Souper Salad" restaurant located at 1977 E. Murray Holladay Road. (R. 32.) As a result of this fall, Longevuan alleged that he sustained injuries for which he received medical treatment.(Id.). This accident forms the basis for his lawsuit. (Id.).

On June 6, 2005, Souper Salad filed a Voluntary Petition for Relief under Chapter 11, Title 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Arizona, Case No. 2:05-BK-10160-SCC (the "Bankruptcy Action"). (Id.). On October 31, 2005, the Bankruptcy Court confirmed Souper Salad's Chapter 11 Plan for Reorganization. The Confirmation Order is attached as Exhibit A. (Id.). The Order provides:

> [T]he Confirmation of the Plan shall . . . discharge the Debtor and its property and assets from all claims that existed or arose before the Confirmation Date and extinguish completely all liabilities in respect of any Claim or other obligation or Equity Interest, whether reduced to judgment or not, liquidated or unliquidated, contingent or non-contingent, asserted or unasserted, fixed or not, matured or unmatured, disputed or undisputed, legal or equitable, known or unknown, that existed or arose from any agreement of the Debtor entered into or obligation of the Debtor incurred before the Confirmation Date, or from any conduct of the Debtor Prior to the Confirmation Date, or that otherwise existed or arose prior to the Confirmation Date . . .

The Confirmation Order also provides the following:

> [T]his Order shall and shall be deemed to permanently enjoin on and after the Effective Date, all Persons that have held, currently hold or may hold a Claim against, or be owed obligations by, the Debtor or the Estate or any Representative of the Debtor or the Estate, or who have held, currently hold or may hold an Equity Interest in the Debtor, from taking any of the following actions on account of such Claim or Equity Interest: (1) commencing, conducting, or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind against the Debtor, the Estate, or any of their respective Affiliates or Representatives . . . .

The Order permanently enjoins all Persons that have held, currently hold, or may hold a Claim against Souper Salad from pursuing such claims. Souper Salad's Chapter 11 Plan became effective November 11, 2005. (R. 33).

Souper Salad did not schedule Longevuan as a creditor, liquidated or unliquidated, in the bankruptcy proceedings. (R. 133). Longevuan had no actual notice of Souper Salad's bankruptcy, prior to receipt of the motion to dismiss. (Id.). At the time of Longevuan's fall, Souper Salad was insured for general liability purposes by an insurer, who had retained current counsel. (Id.). Longevuan is unaware at present of the identity of the insurer, or the policy limits available. (Id.).

Longevuan filed this action against Souper Salad for his injuries on January 18, 2008. (R. 1-6). Souper Salad filed its Motion to Dismiss, based upon the bankruptcy plan, on August 13, 2008. (R. 123-125). In response, Longevuan filed an Amended Complaint against Souper Salad, on August 27, 2008. (R. 126-129). The Amended Complaint alleges the Petition and discharge in bankruptcy, and makes clear that Longevuan's claims are limited to the extent of any liability insurance that Souper Salad might have, applicable to the events alleged in his complaint. (Id.).

The trial court heard argument and granted the motion to dismiss. (R. 149-150). Longevuan

moved for Rule 54(b) certification, (R. 162-163), and this motion was granted. (R. 176-177). This appeal followed. (R. 181-190).

SUMMARY OF ARGUMENT

The bankruptcy stay and discharge obtained by Souper Salad does not immunize it from liability, to the extent that its insurer may be liable. To do so would reward a third-party insurer with a windfall, deny an injured person recovery against that insurer's policy, and defeat the "fresh start" policy of the bankruptcy act.

ARGUMENT

POINT ONE

THE BANKRUPTCY STAY AND DISCHARGE DO NOT EXTEND TO SOUPER SALAD'S INSURER

There are two related questions raised by Souper Salad's bankruptcy: 1) the stay in bankruptcy, and 2) the effect of affirmation of the plan and/or discharge. The stay only applies to suits against **the debtor** for discharged debts.

> A discharge in a case under this title--
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt **as a personal liability of the debtor** . . .

11 U.S.C. §524(a)(1988).

> The stay does not extend to other parties:
> Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of **any other entity on**, or the property of any other entity for, **such debt**.

11 U.S.C. §524(e)(1988).

As to the §524(a) stay, it is clear that the Amended Complaint, limited to the amount of insurance coverage available, is not an action against Souper Salad "as a personal liability of the debtor". Any liability will only accrue against its erstwhile insurers.

As to the §524(e) stay, that language clearly does not apply to "the liability of any other entity on . . . such debt". Likewise, the Amended Complaint, limited to the amount of insurance coverage available, is, in essence, an action against an entity other than the debtor, which is not included in the stay.

There are many cases which have held that the stay and resultant discharge in bankruptcy do not apply to prevent a suit nominally against the debtor, but for the sole purpose of establishing the debtor's liability, to be collected only against a general liability policy of insurance. The rationale is that the discharge of the debtor and resultant stay should not benefit some third party, who received a premium to respond to a suit in damages by a tort plaintiff. A third party such as a liability insurance should not receive a windfall by the fortuity of its insured filing for bankruptcy. For example, ". . . the 'fresh start' policy is not intended to provide a method by which an insurer can escape its obligations based simply on the financial misfortunes of the insured". *In Re Jet Florida Sys., Inc.*, 883 F.2d 970, 975 (11th Cir. 1989).

The plethora of cases supporting this result: *In Re Western Real Estate Fund*, 922 F.2d 592 (10th Cir. 1990); *Green v. Welsh*, 956 F.2d 30 (2d Cir. 1992); *In Re Shondel*, 950 F.2d 1301 (7th Cir. 1991); *Arreygue v. Lutz*, 116 Wn. App. 938, 69 P.3d 881(2003); *Matter of Edgeworth*, 993 F.2d 51 (5th Cir. 1993)(discharge did not bar patient from pursuing medical malpractice action against bankrupt doctor; "Subdivision (a) of section 524 does not enjoin an action against a discharged

debtor when pursued solely to recover from the debtor's insurer"); *Hawxhurst v. Pettibone Corp.*, 40 F.3d 175, 180 (7th Cir. 1994)("a claimant's failure to file a proof of claim in reorganization proceedings under Chapter 11 does not bar the claimant from recovering against the debtor's insurers"); *Forsyth v. Jones*, 57 Cal. App. 4th 776, 67 Cal. Rptr. 2d 357 (1997)(patient could sue bankrupt doctor to establish right to recover on malpractice policy); *In Re Beeney*, 142 B.R. 360 (B.A.P. 9th Cir. 1992)("an action naming the debtor solely to establish the debtor's liability in order to collect on an insurance policy is not barred by Bankruptcy Code § 524."); *In re Coho Resources, Inc.*, 345 F.3d 338, 343 (5th Cir. 2003)(injured worker could enforce judgment against insurers of bankrupt business); *Hall v. National Gypsum Co.*, 105 F.3d 225 (5th Cir. 1997)(bankruptcy discharge did not bar disabled worker's suit for disability insurance benefits against debtor, but paid from separate ERISA plan assets).

The Sixth Circuit considered a very similar case in *In Re Hendrix*, 986 F.2d 195 (6th Cir. 1993). In *Hendrix*, the debtor was involved in an automobile accident, and alleged injured the Pages. The Pages sued Hendrix in state court for damages. In response, Hendrix filed bankruptcy, and even scheduled the Pages in the bankruptcy. After the discharge was granted, Hendrix, through his automobile insurer, filed a motion in the state court personal injury action, arguing that the bankruptcy discharge also barred the state court action. The state court agreed, whereupon the Pages sought relief from the bankruptcy court, to lift the discharge injunction, to allow the state court proceeding to continue, limited to the proceeds of the Hendrix insurance policy. In *Hendrix*, Judge

Posner[1] wrote:

> But as to whether such an injunction extends to a suit only nominally against the debtor because the only relief sought is against his insurer, the cases are pretty nearly unanimous that it does not. In re Shondel, supra, 950 F.2d at 1306-09; Green v. Welsh, 956 F.2d 30 (2d Cir.1992); In re Jet Florida Systems, Inc., 883 F.2d 970 (11th Cir.1989) (per curiam); In re Western Real Estate Fund, Inc., 922 F.2d 592, 601 n. 7 (10th Cir.1990) (per curiam); 3 Collier on Bankruptcy p 524.01 at pp. 524-16 to 524-17 (Lawrence P. King ed., 15th ed. 1991); see also In re Fernstrom Storage & Van Co., 938 F.2d 731, 733-34 (7th Cir.1991); contra, In re White Motor Credit, 761 F.2d 270, 274-75 (6th Cir.1985). The reasoning is that a suit to collect merely the insurance proceeds and not the plaintiff's full damages (should they exceed the insurance coverage) would not create a "personal liability of the debtor," because only the insurance company would be asked to pay anything, and hence such a suit would not infringe the discharge. 11 U.S.C. § 524(a)(2). It would be like a suit against a guarantor of the bankrupt's debt. An alternative line of reasoning proceeds from the statutory reminder that a discharge "does not affect the liability of any other entity on [the debtor's] debt," 11 U.S.C. § 524(e)--and the insurance company is the other. If this is right, the discharge did not in fact prevent the Pages from proceeding in state court against Hendrix, provided they were seeking only the proceeds of his insurance policy.

In Re Hendrix, at 197. It is hard to improve upon Judge Posner's reasoning.[2] See also *Waterson v. Hall*, 515 F.3d 852 (8th Cir. 2008)(acknowleding *Hendrix* with approval, but finding no appealable issue before court).

To make clear that Longevuan is only seeking to recover against any insurance applicable to the claims in his lawsuit, he has filed an amended complaint specifically limiting his recovery to those funds. This ensures that the discharge in bankruptcy of the debtor will not be impaired.

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[1]Judge Posner may well be the smartest judge in the world.

[2]Judge Posner felt that the issue was so clear, that he ordered an OSC why the insurer's counsel should not be sanctioned for pressing the argument in the face of these authorities.

POINT TWO

U.C.A. §31A-22-201 ENSURES THAT LIABILITY INSURANCE POLICIES SURVIVE THE BANKRUPTCY OF THE INSURED

While Souper Salad and the trial court relied exclusively upon federal law, the Utah Insurance Code also supports allowing Longevuan to proceed against Souper Salad to establish the liability of its insurers to him. U.C.A. §31A-22-201 (1985) provides:

Required provisions of liability insurance policies.

> Every liability insurance policy shall provide that the bankruptcy or insolvency of the insured may not diminish any liability of the insurer to third parties, and that if execution against the insured is returned unsatisfied, an action may be maintained against the insurer to the extent that the liability is covered by the policy.

The policies of the (as yet unidentified) insurer(s) for Souper Salad must have a provision providing that they will pay Longevuan, if he prevails, despite the bankruptcy of Souper Salad. Souper Salad should not be allowed to circumvent this statutory protection of Longevuan by asserting the bankruptcy discharge.

CONCLUSION

Souper Salad's insurer(s) seek to obtain a windfall benefit from the bankruptcy discharge. They took premiums from Souper Salad, to defend and compensate tort claimants. The insurer(s) for Souper Salad should not get a free ride from the bankruptcy court. The trial court's summary dismissal of the case as to Souper Salad should be reversed.

DATED this 11th day of March, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13 day of Mar, 2010, a true and correct copy of the foregoing APPELLANT'S BRIEF was mailed by U.S. Mail, first-class postage prepaid, as follows:

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